No. 6533

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANNIE JENSEN and CHRISTIAN JENSEN,

Appellants,

vs.

T. J. SPARKES, Trustee in Bankruptcy of O. STANLEY DRESHER, Bankrupt,

Appellee.

Brief of Appellants

Upon Appeal from the United States District Court for the District of Arizona.

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BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Arizona.

STATEMENT OF THE CASE

This is an appeal by claimants in bankruptcy from an "Order of United States District Judge on Review from Referee." (Tr., p. 1.)

There is no dispute as to the facts and they may be briefly summarized thus:

November 30, 1928, Albert Jensen, as lessor, entered into a written lease with O. Stanley Dresher (Tr., p. 4),

the provisions of which, deemed by appellants to be material to this appeal, follows:

"THE SECOND PARTY" (Dresher), "in consideration of the leasing of the premises as above set forth, covenants and agrees with the first party" (Jensen) "to pay to the first party, as rent for the same, the MONTHLY sum of ONE HUNDRED and SEVENTY FIVE ($175.00) DOLLARS, but this is a lease for five years, and not from month to month, and said rent shall be paid in the manner following:

a. The monthly payments of $175.00 shall be paid in advance on the first day of each month.

b. In event that occupancy should be started other than on the first day of a month, then the first payment shall be paid in advance, and is to be computed on the basis of $175.00 per month from date of beginning of occupancy to the last day of the month in which occupancy begins.

c. On the date of the execution and acknowledgment of this lease by the respective parties, the SECOND PARTY is to and shall pay to first party the sum of ONE THOUSAND FIVE HUNDRED ($1,500.00) DOLLARS, being, approximately, for the last eight and four-sevenths months of the five year period covered by the lease.

d. The first party is to and shall pay to second party interest on said FIFTEEN HUNDRED ($1500.00) DOLLARS at the rate of ten per cent per annum, said interest payable annually, and said interest shall begin to run from the date the said $1,500.00 is paid to first party by second party, and shall continue in effect, *pro tanto,* until the entire $1,500.00

shall have been earned and absorbed by rent for the period to which it is made herein to pertain." (Tr., pp. 9-10.)

"A condition precedent of, and intent of this lease is that First Party" (Jensen) "must, will and shall, and at his own risk and expense, within 30 days from the date hereon, begin and continue, in good faith, the construction of a concrete building on aforesaid lots, which said concrete building shall have a frontage of fifty feet on Main Street and be one hundred feet in depth.

The said building shall be constructed in accordance with plans prepared by the Chevrolet Motor Company, Detroit, Michigan, for the Pinal Motor Company, Superior Arizona, and designated 'Job No. 2912, Sheet No. 1,' which plans are attached hereto, and signed on the face thereof, by the respective parties hereto, and made a part hereof as if drawn and written herein *in haec verba.*" (Tr., pp. 10-11.)

November 30, 1928, Dresher paid Jensen the Fifteen Hundred Dollars above mentioned. (Tr., p. 4.)

Under the terms of said lease, Dresher went into possession of the leased premises March 1, 1929, and continued therein until July 18, 1930, when he was adjudged a voluntary bankrupt. (Tr., p. 4.) Appellee Sparkes is the trustee of such bankrupt estate. (Tr., p. 4.)

May 2, 1929, Albert Jensen assigned the lease and the rent due and to accrue thereunder and deeded the demised premises to Annie Jensen (wife of Christian Jensen) (Tr., p. 6) and at all times thereafter Annie Jensen has been the owner of said property and entitled to the rent accruing under the aforementioned

lease and if any obligation existed on the part of Albert Jensen by virtue of the payment of Fifteen Hundred Dollars by Dresher as aforesaid, that obligation has been assumed by Annie Jensen. (Tr., p. 6.)

Dresher failed to pay his rent for the months of April, May, June, and the first seventeen days of July, 1930, amounting to Six Hundred Twenty-one Dollars ($621.00). (Tr., pp. 4-5.) Appellants paid Dresher interest upon the sum of Fifteen Hundred Dollars ($1500.00) aforementioned. (Tr., p. 5.) Dresher paid no rent after his adjudication in bankruptcy. (Tr., p. 5.)

Sparkes, trustee as aforesaid, abandoned the lease and vacated the demised premises September 24, 1930. (Tr., p. 5.) About October 1, 1930, Annie Jensen leased such premises to Carroll Chevrolet Motor Company for a five-year term beginning October 1, 1930, at a rental of One Hundred Dollars per month for the first four months, One Hundred Twenty-five Dollars per month for the next five months and One Hundred Fifty Dollars per month for the balance of the term. This lease was made upon the most favorable terms that Annie Jensen could obtain by the use of due diligence. (Tr., p. 6.) After Sparkes qualified as trustee, he demanded of Annie Jensen the payment and return of the Fifteen Hundred Dollars paid by Dresher and mentioned in the provisions of the lease hereinabove quoted. She refused to make such payment (Tr., p. 7) but on January 23, 1931, appellants, Annie Jensen and Christian Jensen, filed with the Referee in Bankruptcy their claim

against the estate of Dresher for Six Hundred Twenty-one Dollars rent accrued to the date of bankruptcy. (Tr., pp. 7-8.)

The trustee filed his objections to such claim upon the following grounds:

> "That belonging to this estate in bankruptcy and held by said claimants and which although demand has been made therefore, they neglect, fail and refuse to turn over or pay to this estate in bankruptcy is the following sum of money, to-wit: $1,500.00, cash deposit made by bankrupt under the lease on which said amended claim is founded, together with interest at the rate of ten (10%) per cent per annum from November 30th, 1928, (date of said lease), less credits for any payment or payments of interest to said bankrupt that may be shown to have been made, and less rentals due and unpaid under said lease up to the time of the filing of the petition in bankruptcy, to-wit, July 18, 1930, and further less such charge or amount as may be allowed by the Court for the use and occupancy by this estate in bankruptcy of the premises covered by the lease from the time of the filing of the petition in bankruptcy, to-wit, July 18, 1930, to the time of abandonment of said lease and vacating of said premises, to-wit, September 24, 1930." (Tr., pp. 17-18.)

Upon a hearing upon such claim, and the trustee's objections thereto, the Referee found that the Fifteen Hundred Dollars was an "advancement for the security of the lessor, title to which remained in the bankrupt, and, on his bankruptcy, title vested in the trustee," computed the interest unpaid upon such "advancement" to be Forty-five and 30/100 Dollars, offset

against the aggregate of Fifteen Hundred Forty-five and 30/100 Dollars, Six Hundred Twenty-one Dollars rent accrued to the date of bankruptcy and Two Hundred Twenty Dollars for the use of the premises by the trustee after bankruptcy, and ordered that the claimants, Annie Jensen and Christian Jensen (appellants herein) pay the trustee the balance of Seven Hundred Four and 30/100 Dollars. (Tr., pp. 19-20.)

Upon review of the Referee's order, the District Court increased the allowance for the use of the premises by the trustee to Four Hundred Twenty-nine Dollars and modified the Referee's order so as to direct the claimant-appellants to pay the trustee only the sum of Four Hundred Ninety-five and 30/100 Dollars, the reduction being effective by reason of the increased allowance for the trustee's use of the premises. As so modified, the order of the Referee was, by the District Judge, affirmed. (Tr., pp. 21-22.)

One question to be determined upon the appeal, as it appears to the appellants herein, is whether the Fifteen Hundred Dollars above mentioned was paid by the bankrupt as a mere deposit to secure the faithful performance of his covenants under the lease, or if it was paid as a consideration for the execution of the lease as rent "approximately for the last eight and four-sevenths months of the five-year period covered by the lease;" it being appellants' contention that it was paid as part of the consideration for the lease and appellee's contention that it was a mere deposit.

There is no other question to be determined on the

appeal, unless it be decided that the mentioned Fifteen Hundred Dollars was paid by the bankrupt as a mere deposit to secure the faithful performance of his covenants under the lease. If such should be the court's decision, the further question then will be: Do appellants have the right to retain Thirteen Hundred Fifty Dollars or all of said sum because of the breach by O. Stanley Dresher of the covenants of the lease after bankruptcy and after the demised premises had been released by appellants to minimize damages, in consequence of which a loss to appellants and a liability against O. Stanley Dresher has been established?

SPECIFICATION OF ERRORS

I. The District Court erred in ordering that the sum of Fifteen Hundred Dollars, paid by the bankrupt on November 30, 1928, to lessor, was an advancement for the security of the lessor; and that title to said Fifteen Hundred Dollars remained in the bankrupt; and on his bankruptcy title thereto vested in the Trustee; because the lease, pursuant to which same was paid, provides that said sum was paid as rent and the admitted facts so show. (Appellants' First Assignment of Error, Tr., p. 26.)

II. The District Court erred in directing that Six Hundred Twenty-one Dollars due claimants for rent accrued prior to bankruptcy and the further sums of Four Hundred Twenty-nine Dollars allowed for the use and occupancy of the leased premises from July 18, 1930, to October 1, 1930, be offset against the sum of

Fifteen Hundred Forty-five and 30/100 Dollars, and that the difference, to-wit: Four Hundred Ninety-five and 30/100 Dollars, be paid by Annie Jensen and Christian Jensen to the Trustee in Bankruptcy of O. Stanley Dresher, Bankrupt, because Fifteen Hundred Dollars of the said sum of Fifteen Hundred Forty-five and 30/100 Dollars was paid as rent and was not given to lessor as security; and because it should have been ordered that the Trustee in Bankruptcy pay to Annie Jensen and Christian Jensen said respective sums of Six Hundred Twenty-one Dollars and Four Hundred Twenty-nine Dollars, less Forty-five and 30/100 Dollars, and because Four Hundred Ninety-five and 30/100 Dollars was neither legally due nor payable by Annie Jensen and Christian Jensen to said Trustee. In other words, the amended proof of claim of Annie Jensen and Christian Jensen should have been allowed, without offset, upon the agreed statement of facts. (Appellants' Second Assignment of Error, Tr., pp. 26-27.)

BRIEF OF ARGUMENT

I. THE FIFTEEN HUNDRED DOLLARS WAS A PART OF THE CONSIDERATION FOR THE EXECUTION OF THE LEASE BY THE LESSOR AND WAS NOT A MERE DEPOSIT TO SECURE LESSEE'S PERFORMANCE OF HIS CONVENANTS THEREUNDER.

If the Fifteen Hundred Dollars was paid by the bankrupt as a mere deposit to secure the faithful per-

formance of his covenants under the lease, and if the lease has been terminated, (which appellants do not concede) then the trustee is entitled to the return of the deposit less the amount of any rent due and unpaid at the time the lease was terminated; but if it was paid as a consideration for the execution of the lease or, as appellants contend, as rent "approximately, for the last eight and four-sevenths of the five year period covered by the lease," return can not be enforced, even though the lease terminated prior to its expiration by limitation. See In re Sun Drug Company (9th Circuit Court of Appeals, March 9, 1925), 4 Fed. (2d) 843, 6 A. B. R. (N. S.) 160, wherein this court, speaking through the late Circuit Judge Rudkin, says:

> "If the $5,000 paid by the lessee at the time of executing the lease was a mere advancement to secure the faithful performance of the covenants of the lease, the lessee or his successor in interest was entitled to a return of the money thus advanced, upon the determination of the lease, less the amount of any rent due and unpaid at the time of such determination. But, if the $5,000 was paid as a consideration for the execution of the lease, no part of that consideration was recoverable, either by the lessee or by the trustee in bankruptcy. We think all the authorities are agreed upon these two propositions."

The proper construction to be placed upon the lease in the instant matter may be determined from a review of the available authorities.

What appears to appellants to be a fair statement of the general law applicable to the situation is found in 16 R. C. L., 931, thus:

> "Provision is sometimes made in a lease for the payment in advance of the rents of the last or later periods of the lease, and such a provision has been held not to be a security merely for the lessee's performance of his agreements in the lease, but purely a payment of rent in advance, and therefore may be retained by the lessor though he terminates the lease for the default of the lessee as provided for in the lease."

The leading American case, and one closely in point with that at bar, appears to be Galbraith, Trustee in Bankruptcy of Geo. R. Kibbe, Bankrupt, vs. Wood, 124 Minn. 210, 144 N. W. 945, 50 L. R. A. (N. S.) 1034, decided by the Supreme Court of Minnesota under date of January 2, 1914. That case involved a lease upon a proposal made by the lessee as follows:

> "At the time of the execution of said lease I will pay you the sum of Twenty Thousand ($20,000) Dollars as an advance payment on rent, which advance I will keep good during the first five (5) years of said lease, with privilege of reducing at the rate of Six Thousand Six Hundred Sixty-six Dollars and Sixty-six Cents ($6,666.66) per year for the third, fourth and fifth years of said term."

The trustee in bankruptcy of the lessee made the same contention there that is made by the trustee-appellee here. At the conclusion of a well reasoned opinion by Mr. Justice Bunn, the court holds:

> "The $20,000 payment was made as an advance payment on the rent for the third, fourth, and fifth years of the term; that it was the default of the tenant that prevented his right to have the payment so applied; and that neither he nor plaintiff,

> who of course stands in his shoes, can recover back the payment so made."

To the same effect see Collier vs. Wages, 246 S. W. 746, decided by the Texas Court of Civil Appeals in 1922.

In Casino Amusement Company vs. Ocean Beach Amusement Company, decided by the Supreme Court of Florida, April 2, 1931, ... Fla. ....., 133 S. 559, the lease provided that the sum of Twenty-five Thousand Dollars "paid at the time of the signing of the lease, the receipt of which is hereby acknowledged, shall be credited as rent for the last year of the lease." The lease was for ninety-nine years from January 1, 1925. When but a small fraction of the lease period had expired, the tenant defaulted in paying an installment of rent and was ousted. It brought suit against the landlord for return of the Twenty-five Thousand Dollars advance payment of rent. After reviewing the authorities, the court held:

> "The lease involved in this case expressly provides for an advance payment of rent, not a deposit as security for the performance of the contract, as contended."

and affirmed the trial court's order sustaining a demurrer to the tenant's petition for the return of the advance payment.

To the same effect, appellants cite Schoen vs. New Britain Trust Company (Supreme Court of Errors of Connecticut, June 2, 1930), 111 Conn. 466, 150 Atl. 696, wherein it is said:

"The plaintiffs' recovery of the $15,000 payment depends upon the construction which may be given this provision of the lease: 'The lessor hereby acknowledges the receipt of fifteen thousand dollars, which is to be applied on the last year's payment.' The only payments referred to in the lease are those for rent; 'the last year's payment' obviously refers to the payment of rent—that of the last year of the term of the lease. The period of the lease was ten years; the last year's payment under the lease was $15,000. Two constructions of this provision are claimed—by the plaintiffs that it is a deposit or security; by the defendant that it is a prepayment of rent. The lease is characterized by a complete absence of anything, in terms or words, or by inference, indicating that the $15,000 was a mere deposit as security for the rent. It neither states for what the $15,000 was security nor provides that there should be no breach of the performance for which this amount is claimed to be security. No construction is open to the plaintiffs which will enable them to claim this to be security, unless there can be found in the lease the words 'deposit for security' or their equivalent, and in addition words which signify in terms or by inference for what the deposit was security. The lease does not provide for the return of the $15,000, nor can there be found in it the intendment of the parties by the payment to provide a security for the performance by the lessee of his obligation under the lease.

The lessor was leasing a theater, a property unsuited for another business, for a long period. He must have had in mind the changing character of the business and the location, and the consequent risk to the owners of the property. He must have known that, if the lease were cancelled, or the lessee abandoned his lease, for a considerable period the

theater might be vacant, or a suitable tenant be hard to obtain, and damage to his property might ensue. It was most reasonable for the lessor to protect himself against loss of rental and damage to his property by a provision, such as this, for the payment of the last year's rent.

If the $15,000 was mere security for rent, the lessee might default in the middle of the term and the lessor be compelled to evict him and recover the actual rent due and pay back the deposit, or continue to suffer the persistent default in rent for the whole or a part of the deposit and return the balance. The property of the lessor or its business uses would be apt to be seriously prejudiced if the lessee could act in this way. *The construction of this amount as rent rather than as a deposit for security is the most reasonable one from the standpoint of the lessor and not unfair to the lessee, who must, at the inception of the lease, have intended to perform the covenants and conditions of the lease.*" (Italics ours.)

It will be observed that in the matter here under review, Jensen, the lessor, was by the terms of the lease required to construct a concrete building upon the premises for the use of the lessee, Dresher, in accordance with a special plan prepared by the Chevrolet Motor Company. He was compelled to pay out considerable money (certainly more than the advance payment of rent) in making this improvement. The reasoning employed in the Schoen case, *supra,* is equally applicable to the case at bar; as is that of the Supreme Court of California in Harvey vs. Weisbaum, 159 Cal. 265, 113 Pac. 656, 33 L. R. A. (N. S.) 540, wherein the court says:

"The question, and the only question, that need be decided, is as to whether or not a tenant who has taken possession of the leased premises and paid his rent, or a part of it, in advance, as required by the terms of the lease, can, in the absence of any covenant in the lease, recover the rent so paid in case of the total destruction of the premises by fire without any fault of either party to the lease. . . . The consideration for the advance payment is not only the use of the premises for the month during which the lessee is to use them under the lease, but the conveyance by way of lease and the obtaining possession of the premises. The lease is an interest in real property passing from the lessor to the lessee. *In many cases the landlord may have expended more money than the advanced rent, and for the very reason that he is receiving rent in advance.* It may have been the very inducement to the lease. The destruction of the premises by fire being unforseen, and without the fault of either party in contemplation of law, they each must suffer, and being equally innocent, why should the law interfere to aid the lessee in a case where he had not taken the precaution to provide in his lease for the contingency? The lessee has only paid the money he agreed to pay at the time he agreed to pay it; and, as he has not seen fit to have any provision inserted in the lease as to the recovery of the advance rent, or a part thereof, in case the premises are destroyed by fire, the law will not insert such provision for him, particularly as in many cases it might work a great hardship on the lessor."

Another California case that appears to the appellants to be closely in point to that at bar is Wetzler v. Patterson, decided by the District Court of Appeal for the Second District, July 9, 1925, 73 Cal. App. 527, 238 Pac. 1077. We quote from the opinion as follows:

"Of the covenants on the part of the lessee the instrument contains the following:

> ' . . . The lessee agrees and binds himself: (1) To yield and pay to the lessors as rental for use of the above premises for the term above mentioned the full sum of $8,400, payable at the times and in the amounts as hereinafter set forth, to-wit: $933.33 upon the execution and delivery of this lease, of which amount $233.33 shall be credited by the lessors upon the rental of the premises for the first month, to-wit, the month beginning upon the 15th day of July, 1920, and ending upon the 15th day of August, 1920; $700 of this amount shall be credited by the lessor for the rental due upon said lease for the last three months of the full term of said lease, to wit, for the three months beginning on the 15th day of April, 1923.'

It is then provided that a monthly rental of $233.33 shall be paid on the 15th day of each of the remaining months of the term, namely, on August 15, 1920, and on the 15th day of each succeeding month thereafter until and including the 15th day of March, 1923. Following certain other covenants on the part of the lessee, this paragraph occurs:

> 'It is further agreed by the lessee that upon the breach of any of the conditions above mentioned the sum of $700 heretofore mentioned as rent reserved for the last three months of this lease shall be forfeited to the lessor for breach of the conditions of this lease.'

It is further provided that 'the lessor may enter . . . to expel the lessee if he shall fail to pay the rent as aforesaid.' We have set forth all of the provisions of the instrument which relate to rent, including the times, amounts, and manner of its payment.

On July 7, 1920, defendant took possession of the premises under the lease, and regularly paid the rent until the following month of November. He vacated the premises within a week after the commencement of the unlawful detainer action.

. . .

Appellant's several points, reduced to their simplest form, are: (1) That the court erred in not applying the $700 deposit to the satisfaction of the unpaid monthly rentals; and (2) . . .

(1) The first of these contentions turns upon the true meaning and purpose of that provision of the lease whereby it was agreed that, of the $933.33 to be paid to respondents upon the execution of the lease, $700 should be credited to the rentals for the last three months of the term. If the $700 was intended to be a mere deposit by way of security to insure the faithful performance of appellant's covenants, then upon the forfeiture of the lease, which occurred when appellant failed to pay the accrued rent within the time fixed by the three days' statutory notice, the latter would be entitled to a return of the sum so deposited by him, less the amount of the rent then due and unpaid; and in such case it would be immaterial whether the sum so deposited as security be regarded as a penalty or as liquidated damages. Green v. Frahm, 176 Cal. 259, 168 P. 114; Rez v. Summers, 34 Cal. App. 527, 168 P. 156; Blessing v. Fetters, 40 Cal. App. 471, 191 P. 108. If, however, instead of intending the $700 to be a deposit to secure the faithful performance of appellant's covenants, the parties intended that this sum should be regarded as a payment to respondents upon the contract, by way of part performance by appellant; i. e. if it was intended to be an advance payment for and on account of the last 3 months' installments of rent—then and in that case no part of the $700 can be recovered by appellant, nor can any part of it be off-

set against the amounts sued for by respondents in these actions. The general rule deducible from the authorities is that rent paid in advance cannot be recovered by the tenant upon the termination of the lease for condition broken, when such termination was not brought about by the wrongful act of the landlord. Curtis v. Arnold, 43 Cal. App. 97, 184 P. 510; Galbraith v. Wood, 124 Minn. 210, 144 N. W. 945, 50 L. R. A. (N. S.) 1034, Ann. Cas. 1915B, 609, and authorities cited in the note thereto; Dutton v. Christie, 63 Wash. 373, 115 P. 856; Rockwell v. Eiler's Music House, 67 Wash. 478, 122 P. 12, 39 L. R. A. (N. S.) 894; Evans v. McClure, 108 Ark. 531, 158 S. W. 487; Collier v. Wages (Tex. Civ. App.) 246 S. W. 743; Hepp Wall Paper, etc., Co. v. Deahl, 53 Colo. 274, 125 P. 491. 'In case the rent has been paid in advance under a stipulation that it shall be so paid, and the landlord re-enters for conditions broken, even in the absence of an agreement to that effect, the landlord is entitled to retain the rent so paid, though the re-entry is before the expiration of the period for which the rent was paid.' Galbraith v. Wood, supra. In Curtis v. Arnold supra, Mr. Presiding Justice Waste, speaking for the court, said:

> 'If the money be regarded as given in consideration of the covenants of the lease, when paid, the title thereto passed to the lessor (Ramish v. Workman (33 Cal. App. 19, 164 P. 26) supra; Dutton v. Christie, supra); if it is to be regarded merely as an advance payment of rent, the lessor is entitled to retain it (Galbraith v. Wood, supra . . .).'

In that case our Supreme Court denied a petition to have the cause heard in that court after judgment in the District Court of Appeal. . . .

Thus we are brought to a consideration of the proper interpretation to be placed upon the

clauses in question. Do they mean that the $700 was a deposit to secure the payment of rent and the faithful performance of the lessee's other promises, or do they mean that the $700 is to be considered as an advance payment of the rent for the last three months of the term? We think the latter interpretation expresses the true meaning of the contract. It will be recalled that in the first of appellant's covenants in which the subject of rent is mentioned he binds himself to pay the $8,400—the total rent for the whole term—'at the times and in the sums hereinafter set forth, to wit, $933.33 upon the execution and delivery of this lease,' etc.; and that of this sum, $700 'shall be credited by the lessor for the rental due upon said lease' for the last three months of the term. Here is an unequivocal covenant by the lessee to pay the total rental of $8,400 'at the times' and 'in the sums' set forth in the paragraph wherein this covenant occurs. One of the sums thus to be paid by the lessee on account of the total rental for the whole term is the sum of $933.33. That sum was to be paid immediately 'upon the execution and delivery' of the lease. Of the sum so to be paid to the lessors, $700 was to be 'credited' for 'the rental due upon said lease for the (last) three months of the full term.' There is no reason why the lessors could not or should not credit this sum of $700 upon the rentals for the last three months immediately upon their receipt of the $933.33, i. e., immediately upon the execution of the lease. And it doubtless was the intention of the parties that the money should be so immediately credited by the lessors upon its receipt by them. Nowhere in the instrument is any provision made for the repayment to the lessee of the $700, or for the repayment of any part of the $933.33 which the latter undertook to pay upon the execution of the lease. No provision is made for its repayment at any time or upon any contingency. On

the contrary, the language of this part of the lease clearly implies that all of the $933.33, including the $700 in question, was to belong absolutely to the lessors from the moment of its receipt by them. For these reasons we think it clear that the covenant which we are now analyzing, the one found in the first part of the lease, provides for and contemplates the payment of money, and not the deposit of security. That is to say, *it is a covenant by the lessee for the immediate partial performance by him of his contract to pay rent by making immediately an advance payment of the rent for the last three months of the term.*"

In Foye vs. Simpkinson, decided by the California District Court of Appeal, February 8, 1928, 264 Pac. 331, the Court uses this language:

"The determination of the appeal in this case hinges upon one point. A house lease provides:

'That for and in consideration of the payments of the rents, and the performance of the covenants contained herein, on the part of the said parties of the second part (plaintiffs and appellants), and in the manner hereinafter stated, said party of the first part does hereby lease, demise and let . . . for the term of three (3) years . . . at the monthly rent or sum of three hundred and seventy-five ($375.00) dollars, payable monthly in advance, . . . and in addition to the regular month's rent an additional sum of three hundred and seventy-five ($375.00) dollars to be credited on account of the last month's rent under this lease.'

Many months prior to the expiration date of the lease term, the parties signed the following indorsement on the lease:

'By consent of all parties hereto the foregoing

lease is hereby terminated and possession of said premises and furniture surrendered as of date of May 24, 1921.'

Plaintiffs contended in the trial court, and so contend here, that the $375 paid for the last month's rent should be returned to them. Judgment went for defendant, and plaintiffs appeal upon the judgment roll alone.

The law applicable to this case has been so often considered by the appellate courts of this state that we shall not attempt to review it here. Mr. Chief Justice Waste, when presiding justice of the First District Court of Appeal, collated the cases, and very clearly distinguished them in Curtis v. Arnold, 43 Cal. App. 97, 184 P. 510. Mr. Presiding Justice Finlayson of the Second District Court of Appeal did likewise in Wetzler v. Patterson, 73 Cal. App. 527, 238 P. 1077. Mr. Justice Waste in the above referred to case says:

'If the money be regarded as given in consideration of the covenants of the lease when paid, the title thereto passed to the lessor; if it is to be regarded merely as an advance payment of rent, the lessor is entitled to retain it.'

Mr. Justice Finlayson quotes this language with approval. Under the principles applied in these cases and numerous others cited and commented upon therein, the payment of the last month's rental in the instant case was clearly an advance payment of rent, and the lessor was and is entitled to keep it. McArthur v. Kluck, 75 Cal. App. 785, 243, P. 453; Pedro v. Potter, 197 Cal. 751, 760, 242 P. 926, 42 A. L. R. 1165. There is no element of forfeiture here, as in Parish v. Studebaker, 50 Cal. App. 719, 195 P. 721 and Jack v. Sinsheimer, 125 Cal. 563, 58 P. 130, and no element of deposit as security, as in Rez v. Summers, 34 Cal. App. 527, 168 P. 156."

Again in Pigg vs. Kelley, 268 Pac. 463, the California District Court of Appeal says:

> "The lease contained the following provision:
>
> 'Receipt is hereby acknowledged of the payment of $800.00, representing the first and last two months' rent paid in advance; $600.00 of said amount to be retained as a forfeiture by the parties of the first part of the terms of the lease are violated.'
>
> The object of this action is to recover the sum of $600 mentioned in the quoted provision of the lease. Although the plaintiffs in their complaint alleged that said sum was a payment of rent, on this appeal they contend that it was a deposit by way of security, and that since it is such security, and they have taken an assignment of the lease and agreed to perform all of the lessor's covenants, they are entitled to the security. Defendants admitted by their answer, and still contend, that this $600 was an advance payment of rent. It thus appears that there was no issue raised as to the nature of this payment —notwithstanding which, the court in its findings declared that said sum of $600 was paid as security for the faithful performance of the conditions of the lease. But since the entire lease was copied in the findings, this statement must be regarded as a mere legal conclusion, setting forth the opinion of the court as to the construction of the lease. We think the construction so adopted is erroneous. The provisions of the lease is that the $600 is 'rent paid in advance.' "

In the very recent case of Sinclair vs. Burke (Oregon Supreme Court, May 1, 1930, re-hearing denied June 17, 1930), ... Ore. ....., 287 Pac. 686, a contention similar to that of the appellee in the case at bar is thus disposed of:

"Plaintiff contends, in effect, that the $1,200 was a deposit as security for the last six months' rentals, and to be applied 'when the same shall become due and collectible' and should not be forfeited. Citing Cunningham v. Stockon, 81 Kan. 780, 106 P. 1057, 19 Ann. Cas. 212, and other similar authorities. It is agreed that the question in regard to the return of the $1,200 is one of law.

That sum was paid by plaintiff to defendants pursuant to his covenant in the lease to do so, which money was to be applied upon the last six months' rent. The money thereby became the absolute property of defendants. It was simply an absolute payment of rent in advance, as stipulated by plaintiff in the lease. It was not a deposit as security for the performance of the agreement. The statement in plaintiff's brief in regard to the $1,200 'to apply on the last six months' rental, *when the same shall become due and collectible'* contained the words, which we have underscored, that are not found in the stipulation of plaintiff in the lease.

To construe the agreement, as if it contained such language, would be making a new contract for the parties, which the court cannot do."

To the same general effect, see Forgotston vs. Brafman, 84 N. Y. Supp. 237; Phegley vs. Enke's City Dye Works, 127 Ore. 539, 272 Pac. 898, and Peebles vs. Sherman, 148 Minn. 282, 181 N. W. 715.

If it be contended by appellee that, because Jensen agreed to pay Dresher interest on the Fifteen Hundred Dollars advance payment of rent, that fact in and of itself converted the advance payment into a deposit by way of security, such contention is fully answered by the Supreme Court of Arkansas in Evans vs. McClure,

108 Ark. 531, 158 S. W. 487, which involved a lease providing:

> "Nine hundred dollars to be paid, in advance, for the last months of the term of this lease, and three hundred dollars on or before the first day of November, 1910, and the residue at the rate of three hundred dollars monthly . . . . It is understood and agreed, between the parties hereto, that, on the nine hundred dollars mentioned herein, it being an advance payment of rent, for the last three months of the term of the lease, *that the same shall bear four per cent interest, per annum, and that the interest aforesaid shall be deducted from the payment of rent falling due the first day of July, 1915.*"

Regardless of such interest provision, the court quite properly held:

> "By the express terms of the contract the $900 paid by the original lessee to the lessor was, as we have already seen, simply a payment in advance of rent, and the contract, not containing any provision that it should be paid back, it is not recoverable by the defendants."

To appellants, it seems that nothing could be plainer than the provisions of the lease here in question:

> "c. On the date of the execution and acknowledgment of this lease by the respective parties, the SECOND PARTY is to and shall pay to first party the sum of ONE THOUSAND FIVE HUNDRED ($1,500.00) DOLLARS, being, approximately, for the last eight and four-sevenths months of the five year period covered by the lease.
>
> d. The first party is to and shall pay to second party interest on said FIFTEEN HUNDRED ($1500.00) DOLLARS at the rate of ten-percent per annum, said interest payable annually, and said

> interest shall begin to run from the date the said $1,500.00 is paid to first party by second party, and shall continue in effect, *pro tanto,* until the entire $1,500.00 shall have been earned and absorbed by rent for the period to which it is made herein to pertain." (T., p. 10.)

To hold that the above language means that the Fifteen Hundred Dollars is deposited with the lessor as security for the faithful performance by the lessee of his covenants requires a twisting and straining of language. The language construes itself. The Fifteen Hundred Dollars is rent "approximately, for the last eight and four-sevenths months of the five year period covered by the lease" just as as the lease says.

The authorities cited by appellee in the court below, and which appellants assume will be by appellee presented to this tribunal do not appear to warrant the construction for which he contends.

That Cunningham v. Stockon, 81 Kans. 780, 106 Pac. 1057 is clearly distinguishable from the action here under review, is demonstrated by the following language in the opinion:

> "It is argued that the deposit was only a payment of the last year's rent, and a part performance of the contract, but it cannot be so treated, as the appellants, by dispossessing the appellee and terminating the lease before the fifth year arrived, have made it impossible to apply it on that year. When appellants took possession of the building and appropriated appellee's property in it to their own use, they effectually terminated the lease and ended the obligation of appellee under it for the remainder of the term."

In the case at bar, appellants did not elect to terminate the lease nor did they dispossess the lessee. The lease was abandoned by the trustee in bankruptcy, without any fault of appellants, notwithstanding that appellants' predecessor in interest had expended large sums of money in the construction of a special type of building for the use of the bankrupt during the lease period.

Moumal vs. Parkhurst, 89 Ore. 248, 173 Pac. 669, discloses a situation similar to that described in Cunningham vs. Stockon, *supra*. The lessor having elected to terminate the lease and dispossess the lessee is estopped to assert title to the advance rent and it must be treated as a security deposit. Then too the lease there involved is fairly susceptible of the construction by the court placed upon it, just as the Oregon Supreme Court points out:

> "For the purposes of this opinion all of the material allegations of the complaint are deemed to be true, and the question presented is whether, under the terms and provisions of the lease, the $10,000 was a deposit or an actual payment, and whether the money is to be treated as a penalty or as liquidated damages. There is no provision in the lease for a reletting of the premises by the landlord on account of the tenant for nonpayment of rent or the breach of any covenant. It is alleged that the defendants evicted plaintiff from the premises and thereby terminated the lease and plaintiff's tenancy; that defendants have been in possession ever since and have collected the rents. When used in a pleading, the word 'evicted' has a legal meaning. In an early English case the party evicted was said to be 'expelled, moved and put out'. Bouvier de-

fines 'eviction' as 'deprivation of the possession of lands or tenants,' and says:

> 'It may be fairly stated that any actual entry and dispossession, adversely and lawfully made under paramount title, will be an eviction.'

In McAdam on Landlord and Tenant (4th Ed.) vol. 2, p. 1375, it is said:

> 'The term "eviction", in its primary sense, means a dispossession by legal proceedings or judicial sentence; the recovery of lands and tenements from another's possession by due course of law. The word is now used to denote any act of the landlord by which his tenant is deprived of the enjoyment of the whole or of a part of the demised premises. . . .
>
> 'An "eviction" has been defined as "any act of permanent character done by the landlord or by his procurement with the intention and effect of depriving the tenant of the enjoyment of the premises demised, or part thereof." '

The demurrer admits that the defendants evicted plaintiff and that they are now in possession and collecting the rents, and, in the absence of a provision in the lease for a reletting of the premises by the landlord for and on account of the tenant, it must be assumed that the landlord did not make his re-entry for the purpose of reletting the property and marshaling the rents for and on account of the tenant, and that such re-entry did terminate the lease. Assuming that the lease was terminated, it is the defendants' contention that the $10,000 was an actual payment by plaintiff to defendants at the time the lease was executed, and that through a failure of the plaintiff to pay rental as provided for in the lease they are now entitled to keep and retain the money as a penalty under the terms and provisions of the lease. In Cranston vs. West

Coast Life Insurance Company, 63 Or. 437, 128 Pac. 427, it is said that as usually construed 'payment' means 'a transfer of money from one person who is the payer to another who is the payee in satisfaction of a debt.' To constitute payment, therefore, money or some other valuable thing must be delivered by the debtor to the creditor for the purpose of extinguishing the debt and the debtor must receive it for the same purpose. 'Payment' is defined to be:

> 'The act of paying or that which is paid to discharge the obligation or duty; satisfaction of a claim or recompense; the fulfillment of a promise or the performance of an agreement; the discharge in money of a sum due.'

The lease provides that:

> 'The said lessees do further by these presents hereby *deposit and turn over to the lessor the sum of ten thousand dollars ($10,000.00),* the receipt of which is hereby acknowledged, *which said ten thousand dollars ($10,000.00) is to be held by said lessor* and applied in payment of the rent for the final months under this lease, and taxes for the year 1922; and *in case this lease is for any reason forfeited or declared null and void on account of any fault of the said lessees for the nonpayment of rent or otherwise, then said ten thousand dollars ($10,000.00) shall be and become the property of said lessor.* During the life of this lease, however, the said lessor shall pay to the said lessees interest on said deposit, *until the said sum is taken over by the said lessor in payment of rent* or by forfeiture, annually, at the rate of six per cent. (6%) per annum.'

The lease is for a period of ten years, the interest alone would be $600 per annum, and, upon the theory that the $10,000 was an actual payment to

the defendants at the time of the execution of the lease, the defendants would then be paying plaintiff $600 per annum as interest for the use of their own money. As we understand it, a deposit is made when one person gives to another with his consent the possession of personal property to keep for the use and benefit of the first or a third party.

Under the record we construe the lease to mean that the $10,000 was a deposit with the lessors; that the title to the money remained in the lessees, subject to the terms and conditions of the lease. The question is then presented as to whether the $10,000 is a penalty or liquidated damages."

In the instant case, there is no language in the lease fairly indicative, or even in any way intimating, that the advance rent is a deposit for lessor's security.

If the Moumal case be all that is claimed of it by appellee, certainly the later expression of the same court in Phegley vs. Enke's City Dye Works (Dec. 29, 1928) 127 Ore. 539, 272 Pac. 898 should prevail. In the case last cited, it is said:

"This brings us to the question of whether under the provisions contained in the lease plaintiffs may retain the $900 deposited with them by defendant, and at the same time maintain this action to recover the rent during the six-month period in question. Plaintiffs' contention is that the amount of the deposit was the sum fixed as liquidated damages which were stipulated to be paid upon defendant's breach of the contract, while defendant contends that the provisions for the deposit of the money are invalid because providing for a penalty. We think that neither contention is sound, but rather that the lease provides for a contractual lia-

> bility which defendant entered into upon the execution of the lease. It was stipulated that, upon the full performance of the contract by defendant, it should be credited with said sum in payment of the rent during the last four months of the terms, and that, if the conditions of the lease were broken, then the money deposited should belong to the lessors as a part of the consideration of the lease. These provisions were not in the nature of a penalty, nor did they provide for stipulated damages, although that expression was used in the lease, but rather for a forfeiture of the money upon defendant's breach of the contract."

In re Frey, 26 Fed. (2d) 472, involves a lease describing the payment as security for the payment of rent and performance of the lease and makes provision for repayment by the lessor. Almost the identical situation is described in In re Tanory, 270 Fed. 872; Alvord vs. Banfield, 85 Ore. 49, 166 Pac. 549, and Redmon vs. Graham (Cal.), 295 Pac. 1031. With these decisions appellants have no quarrel.

II. IF THE FIFTEEN HUNDRED DOLLARS WAS DEPOSITED AS SECURITY AND NOT IN PAYMENT OF RENT, THE TRUSTEE COULD NOT ABANDON THE LEASE AND RETAIN THE SECURITY. IN NO EVENT IS THE TRUSTEE ENTITLED TO MORE THAN ONE HUNDRED FIFTY DOLLARS OF SUCH SUM.

If the court determines that the Fifteen Hundred Dollars was paid as rent and not as a deposit, then it

will be unnecessary to consider the question here discussed. This proposition is argued wholly upon the assumption that the Fifteen Hundred Dollars in question was paid as security.

Upon the adjudication of O. Stanley Dresher, bankrupt, the lease dated November 30, 1928, passed to the trustee, as an asset of the said estate, and was not terminated by bankruptcy. The trustee in bankruptcy had a reasonable time, after his qualification as such trustee, to reject the lease as an asset. It is stipulated that the trustee "abandoned the lease . . . and vacated the premises the twenty-fourth day of September, 1930." (Tr., p. 5.) When the trustee abandoned the lease as an asset of the estate, it automatically and contemporaneously with such abandonment reverted to, vested in and became both an asset and a liability of O. Stanley Dresher, entirely free from all relations to his bankruptcy.

The lease continued between O. Stanley Dresher and appellants. Appellants contend that the trustee could not abandon the lease and retain property deposited by bankrupt as security for the performance of the terms thereof. Security was not provided for a period up to such time as lessee became bankrupt, *but for the entire term of the lease.* Rosenblum vs. Uber, decided by the United States Circuit Court of Appeals for the Third Circuit, April, 1919, reported in 43 A. B. R., p. 480, 256 Fed. 584, 167 C. C. A. 614.

In all the cases we have examined where security deposited for the performance of the terms of a lease has

been recovered by lessee or his trustee in bankruptcy, the lease had been terminated by the landlord or by mutual consent. We believe, as pointed out by this court in In re Sun Drug Company, 4 Fed. (2d) 843, *supra,* there is no conflict in the authorities. So far as we have been able to discover, where a lease continues, the security is always retained by the landlord.

Since, after bankruptcy, O. Stanley Dresher failed to pay rent (Tr., p. 5), the lessors had the legal right to compel him to do so and, upon his failure, to apply the Fifteen Hundred Dollars, or so much thereof as necessary, in satisfaction of the defaulted obligations of O. Stanley Dresher.

The lessors, appellants, not only had the right, but it was their duty, to minimize the loss which O. Stanley Dresher would be obligated to pay under the original lease by re-leasing the premises for the highest rent obtainable for the balance of the term of the original lease.

The original lease obligated O. Stanley Dresher to pay One Hundred Seventy-five Dollars rent monthly the first day of each month; on October 1st, 1930, the original lease had forty-one months to run before it expired and at One Hundred Seventy-five Dollars per month, the rental for the balance of the term amounts to Seventy-one Hundred Seventy-five Dollars.

Upon a re-leasing of the premises to minimize damages, the basis of rent was One Hundred Dollars per month for the first four months or Four Hundred Dollars; One Hundred Twenty-five Dollars per month for

the next five months or Six Hundred Twenty-five Dollars; the next thirty-two months at One Hundred Fifty Dollars per month or Forty-eight Hundred Dollars. The total sum, on the re-lease to minimize damages, was Fifty-eight Hundred Twenty-five Dollars. The loss, therefore, to appellants, which O. Stanley Dresher is obligated to pay and for which, for the purposes of this discussion, the Fifteen Hundred Dollars is assumed to have been given as security, is Thirteen Hundred Fifty Dollars.

It is stipulated "that said last mentioned lease was made upon the most favorable terms that Annie Jensen could obtain after using due diligence." (Tr., p. 6.)

Under the law of Arizona, in addition to the Fifteen Hundred Dollars, for the sake of argument assumed to be deposited as security, the lessor has a lien upon all of the property of the bankrupt placed upon or used in the leased premises, as security for the payment of rent to the date of bankruptcy. The statutory provision, Section 1958 of the Revised Code of Arizona of 1928, is as follows:

> "LANDLORD'S LIEN FOR RENT. The landlord shall have a lien on all the property of his tenant not exempt by law, placed upon or used on the leased premises until his rent is paid, such lien, however, shall not secure the payment of rent ensuing after the death or bankruptcy of the lessee or after an assignment for the benefit of lessee's creditors. . . . "

If we were to assume that the tenant, to whom the property was re-leased to minimize the damages, will

meet its obligations, then the difference between the rental specified in the original lease and the amount to be paid under the re-leasing is Thirteen Hundred Fifty Dollars and if the Fifteen Hundred Dollars be security, then at best there would be but One Hundred Fifty Dollars available to the trustee and the amount due appellants for rent prior to bankruptcy and for the use and occupancy of the premises after bankruptcy by the trustee should be reduced by only this amount. But this new tenant may fail to meet its obligations as O. Stanley Dresher did; consequently a disposition of what now appears to be an excess of security is premature.

For the foregoing reasons, appellants respectfully insist that the order appealed from should be reversed and the District Court directed to enter an order allowing appellants' amended claim as presented.

Respectfully submitted,

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